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FOR IMMEDIATE RELEASE

District Court affirms Board's decision to discipline University of Iowa physician

DES MOINES, IA – A Polk County District Court judge has affirmed the Iowa Board of Medicine's decision to discipline a University of Iowa Hospitals and Clinics neuroradiologist for engaging in the excessive use of alcohol, which may impair her ability to practice medicine with reasonable skill and safety.

Judge D.J. Stovall, in a ruling filed Tuesday (July 3, 2012), concluded the Board's decision against Wendy R. Smoker, M.D., was supported by substantial evidence, was not caused by an abuse of the Board's discretion, did not violate her due process, and did not exceed the Board's statutory authority.

On June 21, 2010, the Board filed two charges against Dr. Smoker alleging excessive alcohol use and that she suffers from a physical, neurological or mental condition which may impair her ability to practice medicine with reasonable skill and safety.

A hearing on the charges was held December 21, 2010. On January 24, 2011, the Board filed its decision, finding Dr. Smoker engaged in the excessive use of alcohol which had the potential to affect the safety of her medical practice. The Board made no findings on the second count of suffering from a physical, neurological or mental condition. She was ordered to pay a \$5,000 civil penalty and placed on probation for five years, subject to substance abuse monitoring and counseling.

Dr. Smoker, at a hearing on April 27, 2012, asked the District Court to reverse the Board's decision and to retract any public notices of the disciplinary action against her. She contended there was no evidence that her use of alcohol was excessive, and no evidence this use ever affected her work, endangering or harming a patient.

The following is Judge Stovall's decision:

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

WENDY R. SMOKER, M.D.,

Petitioner,

vs.

IOWA BOARD OF MEDICINE,

Respondent.

CASE NO. CVCV008550

**RULING ON PETITION FOR
JUDICIAL REVIEW**

This Petition for Judicial review matter came before the court for oral arguments on hearing on April 27, 2012. The Petitioner was represented by David Brown. Assistant Attorney General Theresa Weeg appeared on behalf of the Respondent Iowa Board of Medicine. Having reviewed the court file, the certified record, and the applicable law, and being otherwise fully advised of the premises, the court now **AFFIRMS** the Iowa Board of Medicine decision dated January 24, 2011.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Wendy Smoker is a professor at the University of Iowa College of Medicine, and Director of the University of Iowa Hospitals and Clinics Divisions of Neuroradiology and Head and Neck Radiology. By all accounts, she is a skilled practitioner, a respected member of the medical profession, and a frequent speaker at medical conferences, both in the United States and abroad. Prior to accepting her current post at the University of Iowa, Dr. Smoker was a professor and director of neuroradiology at a medical school in Virginia. While in Virginia, she developed a dependence on alcohol and completed a three-month inpatient treatment program at the Farley Center. Dr. Smoker entered the Virginia Physician Health Program for counseling and monitoring in 2000. She experienced a brief relapse in 2001, and returned to the Farley Center for a six-week relapse program.

After relocating to Iowa, Dr. Smoker self-reported with the Iowa Physician Health Program ("IPHP") and entered into a Physician Health Contract on November 30, 2001. This contract was originally set to expire on October 25, 2006. In 2003, Dr. Smoker relapsed and returned to inpatient treatment at Rogers Hospital in Wisconsin. Due to this relapse, the IPHP extended her contract to December 23, 2008. The contract expired on that date and Dr. Smoker

was discharged from its requirements. The IPHP contract specified that if Dr. Smoker relapsed after her release from the program, the IPHP would be authorized to give the contract and all associated documents to the Iowa Board of Medicine. It also stated that although the information in IPHP documents was confidential, such information might be incorporated into public documents in the event the Board of Medicine chose to file charges. Following her release from the IPHP contract, Dr. Smoker continued to attend Alcoholics Anonymous meetings three to four times a week. She has an active AA sponsor and a life coach to assist in her recovery program.

In early 2009, Dr. Jack Kademian, one of Dr. Smoker's colleagues, reported to Dr. Joan Maley that he had seen Dr. Smoker intoxicated at a medical conference in Orlando in February of 2009. Dr. Maley is another physician at the University of Iowa, and was Dr. Smoker's workplace mentor when Dr. Smoker was under contract with the IPHP. Dr. Maley advised Dr. Kademian that Dr. Smoker was no longer under contract with the IPHP, and did not take any action based on this report. In September of 2009, Dr. Kademian again reported to Dr. Maley that he had seen Dr. Smoker intoxicated—this time at a dinner following the Dolan Memorial Lecture, an annual event at the University of Iowa. Dr. Smoker played a prominent role at this dinner, speaking in front of her colleagues and introducing several important people in attendance. Dr. Kademian asked Dr. Maley if he had an obligation to report what he had observed, and Dr. Maley advised him he could speak with medical ethics experts at the university if he was conflicted about what to do. Dr. Maley also spoke to Dr. Smoker about this report, and Dr. Smoker admitted she had some wine at the Dolan dinner.

On October 27, 2009, Dr. Kademian called the Iowa Board of Medicine ("the Board") to report he had seen Dr. Smoker drinking at two professional social events, and he believed she was intoxicated on both occasions. Deb Anglin, the IPHP coordinator, received notice of Dr. Kademian's report, and contacted Dr. Smoker. Dr. Smoker admitted she had relapsed, and Anglin encouraged her to self-report to the IPHP. As of November 9, 2009, Dr. Smoker had not self-reported, and Anglin therefore referred Dr. Kademian's report to Russell Bardin, the chief investigator for the Board. Although Bardin testified it is his usual practice to interview witnesses and the subject of the report, he did not conduct any interviews in this case. He stated he felt he should wait for direction from the Board as to how to proceed, because Dr. Smoker's case was unique based on her admission of drinking and the lack of any allegations of patient harm.

The Board issued a confidential evaluation order on February 4, 2010, ordering Dr. Smoker to undergo a substance abuse evaluation pursuant to Iowa Code section 272C.9(1). Beginning on March 31, 2010, Dr. Smoker underwent a comprehensive assessment at Resurrection Health Care (“Resurrection”) in Illinois. Resurrection’s final report stated Dr. Smoker admitted drinking on two occasions in September of 2009: on September 12 she purchased a bottle of wine and drank two glasses at home, and on or about September 14 she drank three or four glasses of wine at the Dolan dinner. Using the DSM-IV, Resurrection diagnosed Dr. Smoker with Alcohol Dependence, In Partial Sustained Remission, and Major Depressive Disorder by History.¹ The report recommended Dr. Smoker return to a monitoring program similar to the one she had participated in while under contract with the IPHP. The ultimate conclusion was that she was not currently a danger to any patients, but given her history of relapse Dr. Smoker would be a danger to patients and the public if she were to resume drinking alcohol. After reviewing Resurrection’s report, the Board filed a Statement of Charges against Dr. Smoker on June 21, 2010, alleging two counts: (1) excessive use of alcohol which may impair her ability to practice medicine with reasonable skill and safety, and (2) suffering from a mental condition which may impair her ability to practice medicine with reasonable skill and safety.

Hearing took place before the Board of Medicine and Administrative Law Judge Margaret LaMarche on December 21, 2010. Russell Bardin and Dr. John Larson, a psychiatrist from Resurrection, testified on behalf of the Board. Dr. Smoker testified and also called Dr. Craig Rypma, a psychologist, to testify on her behalf. Dr. Rypma performed a civil forensic evaluation of Dr. Smoker on August 2, 2010, and submitted a written report dated September 14, 2010. In his report, he diagnosed Dr. Smoker with Alcohol Dependence in Full Remission and Major Depressive Disorder by History. Dr. Rypma believed there was no basis for Dr. Smoker returning to a monitoring program, because she is able to effectively manage her alcohol dependence with the help of her AA sponsor and life coach. At the hearing, Dr. Rypma

¹ On September 3, 2010, Anglin emailed Carl Malin, Resurrection’s Director of Specialized Assessment Services, to ask which of the DSM-IV criteria for substance dependence applied to Dr. Smoker during her evaluation. Malin responded in a letter dated September 8, 2010. He stated the diagnosis of alcohol dependence in partial sustained remission was based on Dr. Smoker’s prior diagnoses of alcohol dependence by both Farley Center and Rogers Memorial Hospital, her unsuccessful attempt to control her drinking at the Dolan dinner (an event where she was surrounded by colleagues), and the fact that her substance use had continued “despite knowledge of having a persistent or recurrent psychological problem (depression) that is likely to have been exacerbated by the substance”.

acknowledged the DSM-IV states full remission requires a twelve-month period of sobriety, and Dr. Smoker had admitted drinking within twelve months of his evaluation.

The Board filed its decision on January 24, 2011, finding Count 1 (excessive use of alcohol which may impair the ability to practice medicine with reasonable skill and safety) had been established by a preponderance of the evidence. This finding was based on the two occasions when Dr. Smoker admitted drinking; the Board made no findings with respect to the incidents where Dr. Kademian reported he had seen Dr. Smoker drinking or acting intoxicated and she denied doing so. There was no finding of a separate violation under Count 2, but the Board did express concern about the nexus between alcoholism and depression. The Board cited Dr. Smoker for Count 1 and assessed a penalty of \$5000. It also imposed five years of probation to include the following: monitoring by the Board and compliance with the Board's drug screening program, three AA meetings per week and at least one weekly contact with her sponsor, cognitive behavioral therapy from a Board-approved therapist, quarterly reports, and appearances before the Board as directed. On February 21, 2011, Dr. Smoker filed the petition for judicial review that is now before the court. She seeks reversal of the Board's decision, dismissal of the case, and various actions to retract any public notices of the disciplinary actions against her.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, authorizes judicial review of administrative agency decisions. IOWA CODE § 17A.19(1) (2012). The court must grant relief from agency action if the substantial rights of the person seeking review have been prejudiced and the agency action was “[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when the record is viewed as a whole.” *Id.* § 17A.19(10)(f). Substantial evidence is “the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” *Id.* “The question on judicial review is not whether the evidence might support a different finding but whether the evidence supports the findings the commissioner actually made.” *Ward v. Iowa Dep’t of Transp.*, 304 N.W.2d 236, 237–38 (Iowa 1981).

The court must also grant appropriate relief from agency action if such action was in violation of the Iowa or federal constitutions, or if the agency exceeded its statutory authority. IOWA CODE § 17A.19(10)(a)–(b). Additionally, the court must grant relief from agency action that is “[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion.” *Id.* § 17A.19(10)(n). “[I]f the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency’s application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence.” *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

ANALYSIS AND CONCLUSIONS OF LAW

1. The Board’s decision was supported by substantial evidence

Dr. Smoker first claims the Board’s decision was not supported by substantial evidence in the record, and therefore must be reversed. *See* § 17A.19(10)(f). She argues there is no evidence her use of alcohol was excessive, and no evidence this use ever affected her work, endangering or harming a patient. The court finds there is sufficient support for the Board’s findings when Dr. Smoker’s alcohol use in September of 2009 is viewed in context of her history and diagnosis. Additionally, principles previously announced by the Iowa Supreme Court support the Board’s decision to impose discipline even without evidence of patient harm.

The Board found Dr. Smoker consumed alcohol on two occasions following her release from the IPHP contract—once at her home and once at the Dolan dinner, both in September of 2009. This would certainly not be excessive for someone who did not have a history of alcohol dependence. However, Dr. Smoker has struggled with alcohol abuse and recovery for over ten years. She has experienced relapses and has undergone inpatient treatment and monitoring. In its report, Resurrection diagnosed Dr. Smoker with Alcohol Dependence, in Partial Sustained Remission, and found that, given her history of relapse, she would be a danger to patients and the public if she resumed drinking. With this background and diagnosis in mind, the Board found Dr. Smoker’s two incidents of drinking in September of 2009 warranted discipline and resumed monitoring. The court finds this was a judgment call the Board was entitled to make. *See George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 154 (Iowa 1997) (stating “judgment calls” regarding sufficiency of the evidence are “clearly within the agency’s domain”).

All involved in this case agree no patient harm has ever occurred as a result of Dr. Smoker's drinking. However, in *Burns v. Board of Nursing*, 495 N.W.2d 698 (Iowa 1993), the Iowa Supreme Court considered sanctions the Board of Nursing had imposed on a nurse for "habitual intoxication" and stated, "The nursing board should not be required to wait until the habitual intoxication becomes so debilitating that there is immediate danger of harm to patients." *Id.* at 701. Dr. Smoker points out factual distinctions between her case and that of the nurse in *Burns*, but the court finds the underlying principle of that case supports the Board's decision to impose discipline here. In the Board's view, a proactive approach and a return to monitoring was necessary to ensure Dr. Smoker's apparently isolated relapses did not escalate into drinking that could result in patient harm. The court will not interfere with this decision.

2. The Board's decision was not an abuse of discretion

The court may grant appropriate relief from agency action that is "unreasonable, arbitrary, capricious, or an abuse of discretion." IOWA CODE § 17A.19(10)(n). Dr. Smoker argues she is entitled to such relief because the Board failed to investigate the claims against her and the potential bias of Dr. Kademian, and because, by all accounts, she is a highly skilled neuroradiologist who has never placed a patient's health at risk. Her point regarding lack of patient harm has already been addressed above. Just as the lack of patient harm does not mean there is not substantial evidence to support the Board's decision, it also does not render the decision unreasonable, arbitrary, capricious, or an abuse of discretion.

In support of her claim the Board's decision must be reversed under section 17A.19(10)(n), Dr. Smoker points out that Bardin, the Board investigator assigned to her case, admitted he did not interview any witnesses and did not take a statement from Dr. Smoker herself before the Board filed charges. The Board responds by noting it ordered Dr. Smoker to undergo a comprehensive substance abuse evaluation at Resurrection as part of its investigation, and Dr. Smoker admitted the two occasions of drinking on which the Board based its decision. The court agrees with the Board that its decision was not unreasonable by virtue of the methods or the extent of the investigation. Deb Anglin of the IPHP spoke to Dr. Smoker after learning of Dr. Kademian's report, and Dr. Smoker admitted she had relapsed. In light of this admission, Dr. Kademian's motivations for making the report are irrelevant. The Board clearly did not base its decision on any incidents of drinking Dr. Kademian reported but Dr. Smoker did not admit, so it is difficult to see how interviewing additional witnesses would have been helpful to Dr.

Smoker. The multidisciplinary team at Resurrection interviewed Dr. Smoker extensively and talked to many of her colleagues before creating their report, and the Board relied heavily on this report in making its decision. The report confirmed Dr. Smokers' prior diagnoses of alcohol dependence, and confirmed that she had admitted to the two incidents of drinking in September of 2009.

Abuse of discretion is synonymous with unreasonableness, and occurs when an agency's exercise of its discretion is "clearly erroneous or rests on untenable grounds." *University of Iowa Hospitals and Clinics v. Waters*, 674 N.W.2d 92, 96 (Iowa 2004). Agency action is arbitrary and capricious when it is taken without regard to the law and facts of a particular case. *Doe v. Board of Medical Examiners*, 733 N.W.2d 705, 707 (Iowa 2007). Here, the Board acted based on Dr. Smoker's own admissions of her relapse and the findings of a multidisciplinary substance abuse evaluation team. The court finds no error that warrants reversal or modification of the decision under section 17A.19(10)(n).

3. The Board's decision did not violate due process or equal protection

Dr. Smoker makes two constitutional arguments for the reversal of the Board's decision. See IOWA CODE § 17A.19(10)(a) (the court may grant relief from agency action that is "[u]nconstitutional on its face or as applied . . ."). First, her due process argument is based on what she claims was a complete lack of investigation by the Board and allegations the Board obstructed her access to evidence that would have been helpful to her. The court has addressed the issue of the Board's investigation in Part 2 above, and finds no constitutional violation in that regard for the reasons already discussed. With respect to the obstruction-of-evidence issue, Dr. Smoker argues the Board's decision is a violation of her due process rights because the Board sent certain documents to Resurrection to assist them in completing her evaluation, and Resurrection destroyed those documents when it was finished with her report. According to Dr. Larson, the psychiatrist who testified at Dr. Smoker's hearing before the Board, it is Resurrection's standard practice to shred documents related to the subject of an evaluation when the report on that particular subject is complete. Dr. Smoker's counsel requested a copy of the documents the Board sent to Resurrection to aid in the substance abuse evaluation, and the Board sent these documents in an email dated September 14, 2010.

As the party asserting invalidity, Dr. Smoker bears the burden to demonstrate the required prejudice. IOWA CODE § 17A.19(8)(a). The court finds she has not shown she was

denied access to any evidence that would have materially changed the Board's decision. In fact, the Board provided a copy of the information it sent to Resurrection, albeit with some redactions, and Dr. Smoker introduced some of these documents as exhibits. At the time of the hearing on the petition for judicial review, Dr. Smoker's counsel indicated the Board may have provided misleading or incomplete information to Resurrection regarding lab results from 2007 and 2008—information that made it appear as if Dr. Smoker had relapsed at that time due to false positive alcohol screening results. However, in his testimony at the administrative hearing, Resurrection psychiatrist Dr. Larson stated the disputed test results from 2007 and 2008 were not relevant to his conclusions in the 2010 Resurrection report.²

Dr. Smoker's equal protection argument is that she was disciplined by the Board without any factual support or investigation, and therefore she has been singled out for disparate treatment. The court has addressed the adequacy of the factual support for and investigation into the charges against Dr. Smoker in Sections 1 and 2 above. There is substantial evidence to support the charges and the Board's decision, based on Dr. Smoker's own admissions of drinking in 2009 and the conclusions contained in the Resurrection report. The Board admittedly did not proceed as usual in its investigation of this case, but it did act on statements from Dr. Smoker herself and it did order a comprehensive evaluation at a substance abuse facility.

In support of her equal protection argument, Dr. Smoker cites to *Glowacki v. Board of Medical Examiners*, 501 N.W.2d 539 (Iowa 1993), a case in which the Iowa Supreme Court struck down a statute prohibiting the district court from issuing a stay of a Board disciplinary decision pending judicial review, finding it violated equal protection. The court noted the Board had admitted the physician in *Glowacki* was “no threat to the public,” and therefore found “the only purpose to be served in withholding Glowacki's right to a stay would be to single him out as a physician for more severe punishment by denying him an effective review.” *Id.* at 542. Here, the Board has not admitted Dr. Smoker is “no threat to the public”—it has only acknowledged there has been no patient harm as a result of her drinking up to this point. While the physician in *Glowacki* was charged with improper billing practices, Dr. Smoker's charges concern an addiction that, if not managed effectively, could eventually impact the quality of care Dr.

² When asked what relevance the 2007 and 2008 test results had to his 2010 evaluation and the conclusions reached in that report, Dr. Larson responded, “They certainly had no relevance. You know, my—my conclusion here was fairly simple because Dr. Smoker was the source of all the information. She admitted she relapsed. She was—she admitted drinking, was very forthright about it, recognized the impact that it had on her program and her sobriety and took steps to try to deal with that herself.” Hearing Transcript, p. 112.

Smoker's patients receive. Therefore, the court finds *Glowacki* is inapplicable to the case at hand. Dr. Smoker has not demonstrated any constitutional violation, based on either due process or equal protection, that requires reversal or modification of the Board's decision.

4. The Board did not exceed its statutory authority in reviewing Dr. Smoker's IPHP file

Finally, Dr. Smoker argues the court must reverse or modify the Board's decision because the Board exceeded its statutory authority when it delved into the file detailing her prior involvement with the IPHP. *See* IOWA CODE § 17A.19(10)(b) (the court must grant relief from agency action that is "[b]eyond the authority delegated to the agency by any provision of law"). The Board makes several arguments in response, but the court finds only one of these arguments necessary to justify the use of Dr. Smoker's IPHP file. The contract Dr. Smoker signed with the IPHP included the following paragraph:

I understand that if I experience a relapse, and/or the recurrence or worsening of my condition at any time after I have been released from this contract, the [IPHP] may refer the contract and all documents related to my impairment and recovery, including all documents from evaluating facilities and treatment providers, to the Board to be maintained as part of a confidential investigative file. I am aware that although material in the investigative file is confidential, information from those files may be incorporated into a public document in the event the Board files a statement of charges.

(State's Exhibit 10). Dr. Smoker does not dispute that this language appeared in her IPHP contract, nor does she offer any reason it should not apply in this situation. Therefore, the court finds this final argument is without merit, and the Board's decision must be affirmed in its entirety.

ORDER

IT IS THEREFORE ORDERED that the decision of the Iowa Board of Medicine dated January 24, 2011, is hereby **AFFIRMED IN ITS ENTIRETY**. Costs, if any be assessed, are taxed to the Petitioner.

Dated this 3rd day of July, 2012.

D. J. STOVALL, JUDGE
FIFTH JUDICIAL DISTRICT

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